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No. 91-1188

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES ROWLAND, et al., Petitioners,

v.

CALIFORNIA MEN'S COLONY, UNIT II
MEN'S ADV. COUNCIL, Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Respondent served its supplemental brief on August 4, 1992. Respondent therein advanced the argument that Patterson v. Shumate, __ U.S.__, 112 S.Ct. 2242 (1992) is recent authority relevant to the determination of this case.

ARGUMENT

I. PATTERSON AND OTHER STATUTORY INTERPRETATION CASES FROM LAST TERM HOLD THAT EVEN WHERE THE LANGUAGE OF A STATUTE IS PURPORTEDLY PLAIN, PRUDENCE DICTATES THAT RELEVANT LEGISLATIVE HISTORY BE EXAMINED

Respondent cites Patterson in support of its position. However, it must be noted that respondent now appears to be arguing, in light of Patterson, that relevant legislative history must be taken into account even if the thrust of the argument is the "plain meaning" of the statute.

Patterson presented the following question: Does an anti-alienation provision contained in an ERISA-qualified pension plan constitute a restriction on transfer enforceable under applicable nonbankruptcy law (11 U.S.C. section 541(c)(2)) such that the debtor's interest in the plan was properly excluded from the property of the bankruptcy estate? Patterson, 112 S.Ct. at 2245.

This Court found that nothing in the plain language of the statute or in the legislative history showed an intent to limit the term "applicable nonbankruptcy law" to state law. Indeed, Congress had restricted applicable law to state law several times in the Bankruptcy Code and had not explicitly restricted section 541(c)(2) in a similar manner. Patterson, 112 S.Ct. at 2246. This interpretation of the statute, combined with this Court's holding that the pension interest was properly within the ERISA exclusion (Patterson, 112 S.Ct. at 2247-8), compelled the conclusion that the interest was still the debtor's.

Patterson states, and will be cited in the future, for the bald proposition that clear statutory language creates no ambiguity, and that only ambiguity will lead to resort to legislative history. Id. at 2248. However, this statement is immediately followed in the text of the opinion with a discussion of the legislative history. Indeed, this Court used the legislative history to bolster its interpretation of the supposedly "clear" statutory language. Id. This Court found a surplusage argument without merit, a discussion not relevant to the issues presented in this case. Finally, this Court considered and rejected an argument that the Court's interpretation was contrary to the Bankruptcy Code's policy of including all assets in the bankruptcy estate. Patterson, 112 S.Ct. at 2249. The briefest review of the case shows that Patterson is not a "plain meaning" case but rather one in which all information relevant to meaning was considered. Because all analyses of the statute and its context were consistent, no member of the Court dissented.

Justice Scalia, in concurring with the result, noted that the result was consonant with "a neutral and rational interpretive methodology" involving consideration of the entire Bankruptcy Code. Patterson, 112 S.Ct. at 2251. In fact, consideration of the entire context of the provision in question, rather than the "one-subsection-at-a-time approach", is the key for his call for a return to the "normal and obvious" and "attention to text", and for an "agreed-upon methodology for . . . interpreting text". Patterson, 112 S.Ct. at 2250.

Patterson, then, stands for reasoned consideration of the entire context of a statute as well as legislative history. The case ultimately holds that self-imposed ignorance is not the guiding rule of statutory interpretation. As Justice Souter reiterated in U.S. v. Thompson/Center Arms Co., 112 S.Ct. 2102, 2109, n.8 (1992), quoting Justice Frankfurter in U.S. v. Monia, 317 U.S. 424, 432 (1943) [dissent]:

> [T]he statute. . .is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners.

In resolving INS v. National Center for Immigrants' Rights, _ U.S._, 112 S.Ct. 551, 557-558 (1991) the Court quoted Justice Frankfurter in U.S. v. Witkovich, 353 U.S. 194, 199 (1957):

> [O]nce the tyranny of literalness is rejected, all relevant considerations for giving a rational content

> to the words become operative. A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole, by the persuasive gloss of legislative history or by the rule of constitutional adjudication . . .

Clarity of meaning is of course a subjective conclusion. But how clear any given language is may be partially determined by any lack of contrary information, whether that information is legislative history, a similar phrasing in other statutes, or other comparative data. A prudent court, however clear the language in question might be, would certainly consider any hint of dissonance from these sources. Not the least of these sources is the policy of the legislation of which the provision in question is a part. As the dissenters stated in Cipollone v. Liggett Group, __ U.S. __, 112 S.Ct. 2608, 2632 (1992):

> The ultimate question in each case . . . is one of Congress'[] intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved.

A statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context. King v. St. Vincent's Hosp., _ U.S._, 112 S.Ct. 570, 574 (1991). Ultimately, the "agreed-upon methodology" desired by Justice Scalia may be no more than the cardinal lawyer's rule that nothing relevant should be ignored.

Due to the page limitations for supplemental briefs (Supreme Court Rule 33.3), substantial examination of all statutory construction cases during the last term cannot be

made here. However, Table One, set forth in the appendix, indicates whether either plain meaning or legislative history or context was considered, and which doctrine was utilized by the majority, concurring, plurality, and minority opinions.

Table One shows there is no case where legislative history or other ancillary sources are not consulted whether or not the meaning of the statute is deemed plain. Indeed, the plurality opinion in U.S. v. R.L.C., _ U.S._, 117 L.Ed.2d 559, 568 (1992), Part II-B, is the only opinion in the group which recites the classic "plain meaning" rule that no resort to legislative history should be made if the language is clear. A discussion of the legislative history immediately followed this language in Part II-C. Obviously, the same prudential rule followed in the other cases informed R.L.C.

II. EXAMINATION OF SIMILAR STATUTORY INTERPRETATION CASES FROM LAST TERM INDICATES THAT THE LEGISLATIVE SILENCE IN THE INSTANT CASE CANNOT COMPRISE POSITIVE LEGISLATIVE INTENT TO AWARD ASSOCIATIONS AND CORPORATIONS IN FORMA PAUPERIS STATUS

Last Term's cases illustrate that reference to legislative history is made as a matter of course by a majority of the Court even when a "plain meaning" is interposed. A review of selected cases from last term also shows that respondent's substantive arguments are meritless.

Patterson, as noted above, seems to be a "plain meaning" case favorable to respondent because it rejects another interpretation based on legislative history. However, this analysis reflects Justice Scalia's dissent, not the majority's reasoning. The majority found "applicable nonbankruptcy law" to include both federal and state law in part because this interpretation "comports with other references in the Bankruptcy Code to sources of law." Patterson, 112 S.Ct. at 2246.

> The Code reveals, significantly, that Congress, when it desired to do so, knew how to restrict the scope of applicable law to "state law" and did so with some frequency. . . . Congress' decision to use the broader phrase, "applicable nonbankruptcy law" . . . strongly suggests that it did not intend to restrict the provision in the manner that petitioner contends.

Id. at 2246-2247. Thus, although the phrase in question may have been "plain" in not being "self-restrictive" en soi, there was adequate corroborating evidence of Congress' intent in parallel structures throughout the Bankruptcy Code. No such corroborating features guided the Ninth Circuit in deciding the instant case.

Union Bank v. Wolas, __ U.S.__, 112 S.Ct. 527, 528 (1991) is similar to Patterson in that its "plain meaning" language may be oversold. Once again, Justice Scalia's dissent states the "plain meaning" rule in its purest form. Justice Scalia noted that in the absence of a scrivener's error producing an absurd result, the language clearly did

not distinguish between long- and short- term debt, the litigation was unnecessary and unmaintainable. Union Bank, 112 S.Ct. at 534; compare U.S. v. R.L.C., 117 L.Ed.2d 559, 577-578 [O'Connor, J., dissenting] (court cannot infer major change in juvenile sentencing by mere deletion in technical bill).

Union Bank examined the question of whether payments on long-term debt by a bankrupt business are transfers in the ordinary course of business such that the trustee cannot recover them. The majority held that both long-term and short-term debt may qualify for the exception but left undetermined the predicate situation, whether the loans were in the ordinary course of business. Id. at 533-534.

As in the instant case, Union Bank involved a subsequent amendment of the statute for which there was undisputed legislative history. The statute was amended in pertinent part to provide that the ordinary course of business exception did not apply unless the payment was made within 45 days of the date the debt was incurred. Later, the 45-limitation was deleted. The nub of the problem was whether, in the absence of any positive statement by Congress, these amendments reflected a changing attitude towards protection of long-term, as opposed to short-term, debtors. Union Bank, 112 S.Ct. at 530-531. This Court noted that the fact that Congress may not have foreseen all the consequences of a statutory enactment may not be a sufficient reason for refusing to give effect to plain meaning. Having exhausted the statutory history of the provision, the Court noted that the

recovery provision and exception were not codifications of the pre-Bankruptcy Act exception for trade vendors. Id. at 531-532. Finally, this Court noted it could not say that Congress had not attempted to satisfy the dual purposes of the Bankruptcy Act, equal distribution and preventing a race to the courthouse to seize debtor assets, when it deleted the 45-day limitation. Id. at 533.

It must be noted that the deletion in Union Bank is more meaningful that the change from "citizen" to "person" in the instant case. In Union Bank, Congress added a limitation and then repealed it by directly amending the same provision. "[E]ven if Congress [repealed the limitation] to redress particular problems of short-term creditors, it remains true that Congress redressed those problems by entirely deleting the time limitation . . ." Union Bank, 112 S.Ct. at 531. Surely, a reversal of policy is implied by subsequent deletion of the provision enacting the policy in the first place. Nothing so positive may be drawn from the instant case, as a mere substitution of "person" for "citizen", in light of the relevant legislative history, was narrowly intended to convey the benefits of in forma pauperis status to resident aliens.

CONCLUSION

If Patterson is considered relevant, attention must be paid to the other statutory interpretation cases issued last term. Unfortunately, consideration of these cases yields no consistent rule, but rather, a rule of combination of rules. It is untoward to suggest that an element of intuitive guidance informs the decisions in these cases.

However, it is clear that this Court, in deciding these rather arcane matters of legislation, does in fact function as an interstitial and coordinate legislative body in those marginal areas where the statute's imperfections are self-evident.

DATED: August 31, 1992

Respectfully submitted,

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APPENDIX

TABLE ONE

Supreme Court Cases from the October 1991 Term Dealing with Statutory Interpretation

This table lists Supreme Court cases from the October 1991 term which dealt with the interpretation of statutes or regulations. Majority, plurality, concurring and minority opinions which utilize a pure plain meaning approach or which deal with legislative history or context are noted with the appropriate page citation. The justices adhering to the opinions and a short quotation from the opinion are set forth in the footnotes.

For example, the majority opinion in Ardestani at page 520 states: "In this case, the legislative history cannot overcome the strong presumption 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" Therefore, although Ardestani will be cited as a "plain meaning" case in the future, this Court considered legislative history in deciding the issue and the majority opinion is listed under "Legislative his./context" in the table. The Ardestani dissent is listed under this heading because it is based on consideration of the legislative history rejected by the majority. Therefore, a listing under the "Legislative his./context" encompasses any case where the Court considered legislative history or context, whether or not that history or context proved determinative of the result.

Case	Plain meaning	Legislative his./context
Ardestani v. INS 112 S.Ct. 515		Maj., 520[1] Min., 522[2]
Union Bank v. Wolas 112 S.Ct. 527 (1991)	Con., 534[3]	Maj., 531[4]
INS v. Nat. Cen. for Imm. Rights 112 S.Ct. 551 (1991)		Maj., 558[5]
King v. St. Vincent's Hosp. 112 S.Ct. 570 (1991)		Maj., 574[6]
INS v. Elias-Zacarias 112 S.Ct. 812 (1992)	Maj., 816[7]	Min., 818[8]
Presley v. Etowah Co. Comm. 112 S.Ct. 820 (1992)		Maj., 829[9] Min., 837[10]
U.S. v. R.L.S. 117 L.Ed.2d 559 (1992)	Con., 573[11] Con., 576[12]	Plu., 568[13] Dis., 577[14]
Nationwide Mut. Ins. Co. v. Darden 117 L.Ed.2d 581 (1992)		Maj., 590[15]

Case	Plain meaning	Legislative his./context
U.S. v. Alaska 112 S.Ct. 1606 (1992)		Maj., 1611[16]
U.S. Dept. of Energy v. Ohio 112 S.Ct. 1627 (1992)		Maj., 1635[17] Con./Dis. 1641[18]
U.S. v. Burke 112 S.Ct. 1867 (1992)	Con., 1875[19]	Maj., 1870[20] Con., 1877[21] Dis., 1879[22]
U.S. v. Thompson /Contender Arms Co. 112 S.Ct. 2102 (1992)	Con., 2111[23] Dis., 2113[24] Dis., 2114[25]	Plu., 2108[26]
Patterson v. Shumate 112 S.Ct. 2242 (1992)	Con., 2250[27]	Maj., 2248[28]

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[1] O'Connor, Rehnquist, White, Scalia, Kennedy, Souter.

"In this case, the legislative history cannot overcome the strong presumption 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"

"We are unable to identify any conclusive statement in the legislative history regarding Congress' decision to define adversary adjudications . . ., much less one that would undermine the ordinary understanding of the phrase 'under section 554'."

[2] Blackmun, Stevens.

"The Court's opinion is all the more troubling . . . because it suggests that the Court has forgotten its recent admonition that the EAJA must be construed 'in light of its purpose to diminish the deterrent effect of seeking review of, or defending against, governmental action.'"

[3] Scalia.

"Since there was here no contention of a 'scrivener's error' producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable."

[4] Stevens for a unanimous Court.

"We need not dispute the accuracy of respondent's description of the legislative history of the 1984 amendment in order to reject his conclusion."

[5] Stevens for a unanimous Court.

"The contested regulation is wholly consistent with this established concern of immigration law and thus squarely within the scope of the Attorney General's statutory authority."

[6] Souter for all members except Thomas, who did not participate.

"[W]e do nothing more . . . than follow the cardinal rule that a statute is to be read as a whole, . . . since the meaning of the statutory language, plain or not, depends on context."

[7] Scalia, Rehnquist, White, Kennedy, Souter, Thomas.

"In construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."

[8] Stevens, Blackmun, O'Connor.

"The narrow, grudging construction of the concept of 'political opinion' that the Court adopts today is inconsistent with the basic approach to this statute endorsed in [citation utilizing 'plain language, . . . United Nations Protocol, and . . . legislative history. . .']."

[9] Kennedy, Rehnquist, O'Connor, Scalia, Souter, Thomas.

"Yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision."

[10] Stevens, White, Blackmun.

"The reenactment of section 5 . . . reflected congressional approval of Allen's broad interpretation of the Act."

[11] Scalia.

"[I]t is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history."

[12] Thomas.

"I agree with Justice Scalia that the use of legislative history to construe an otherwise ambiguous penal statute is difficult to reconcile with the rule of lenity."

[13] Souter, Rehnquist, White, Stevens, Scalia, Kennedy, Thomas, as to Parts I, II-A, III. Souter, Rehnquist, White, Stevens, as to Parts II-B, II-C. The following excerpt is from Part II-A, in which the majority turns to statutory construction after finding the words ambiguous. This is consistent with classic plain meaning doctrine.

"[W]e turn to examine the textual evolution of the limitation in question and the legislative history that may

explain or elucidate it."

[14] O'Connor, Blackmun.

"By failing to interpet [the statute] in light of the statutory scheme of which it is a part, the Court interprets a 'technical amendment' to make sweeping changes to the process and focus of juvenile sentencing."

[15] Souter for a unanimous Court.

"[A]fter each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning."

[16] White for a unanimous Court.

"The statutory antecedents of this provision similarly offer little insight into Congress' intent."

[17] Souter for a unanimous Court with respect to Part II-C. Souter, Rehnquist, O'Connor, Scalia, Kennedy, Thomas with respect to the remainder of Souter's opinion. The following excerpt is from Part II-A.

"What we find elsewhere in each statute are various provisions specially defining "person" and doing so expressly for purposes of the entire section in which the term occurs."

[18] White, Blackmun, Stevens, concurring and dissenting.

"It is axiomatic that a statute should be read as a whole."

[19] Scalia.

"[T]here is no basis for accepting, without qualification, the IRS' 'tort rights' formulation, since it is not within the range of reasonable interpretation of the statutory text."

[20] Blackmun, Rehnquist, White, Stevens, Kennedy.

"Neither the text nor the legislative history of section

104(a)(2) offers any explanation of the term 'personal injuries.'"

[21] Souter.

"Our cases have. . . recognized parallels (although for different purposes) between tort claims and claims under anti-discrimination statutes other than Title VII."

[22] O'Connor, Thomas.

"The purposes and operation of Title VII are closely analogous to those of tort law, and that similarity should determine excludability of recoveries for personal injury under . . . section 104(a)(2)."

[23] Scalia, Thomas.

"The plurality reaches its textually uncharted destination by determining that the statutory definition of 'make,' the derivative of which appears as an operative word in . . . section 5821 . . . , covers the making of parts that, assembled, are firearms."

[24] White, Blackmun, Stevens, Kennedy.

"I agree with the majority that this pinched interpretation of the statute would fail to accord the term 'make' its full meaning as that term is defined, section 5845(i), and used in the definition of the term 'rifle', section 5845(c)."

[25] Stevens.

"I agree with Justice White . . . and also with the Court . . . that respondent has made a firearm even though it has not assembled its constituent parts."

[26] Souter, Rehnquist, O'Connor.

"While such a conclusion of redundancy could suggest that Congress assumed that 'make' in the NFA did not cover unassembled parts, the suggestion (and the implied conflict with out reading of 'make') is proven false by

evidence that Congress actually understood redundancy to result from its new silencer definition."

[27] Scalia.

"When the phrase 'applicable nonbankruptcy law' is considered in isolation, the phenomenon that three Courts of Appeals could have thought it a synonym for 'state law' is mystifying."

[28] Blackmun for a unanimous Court.

"Even were we to consider the legislative materials to which petitioner refers, . . . we could discern no 'clearly expressed legislative intention' contrary to the result reached above."

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On September 4, 1992, I served the attached **PETITIONER'S SUPPLEMENTAL BRIEF** in Rowland, et al. v. California Men's Colony, Unit II Men's Advisory Counsel, No. 91-1188, by placing a true copy thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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Cynthia Bain
AFFIANT

Subscribed and sworn to before
me this 4th day of September, 1992.

Rosalind D. Lender
Notary Public in and for said
County and State

ROSALIND LENDER
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SACRAMENTO
My Comm. Exp. March 14, 1993